

# The U.S.-India Defense Relationship: Putting the Foundational Agreements in Perspective

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February 2017





U.S. Navy photo caption: Ensign Samson Cohen, from Washington, D.C., finds the range and speed of the Indian Navy Centaur-class aircraft carrier INS *Viraat* (R22) from the bridge wing of the Ticonderoga-class guided-missile cruiser USS *Antietam* (CG 54) during an exercise as part of India's International Fleet Review (IFR) 2016. IFR 2016 is an international military exercise hosted by the Indian Navy to help enhance mutual trust and confidence with navies from around the world. *Antietam*, forward deployed to Yokosuka, Japan, is on patrol in the 7th Fleet area of operations in support of security and stability in the Indo-Asia-Pacific.

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## Abstract

Three proposed defense foundational agreements between the United States and India—the Logistics Exchange Memorandum of Agreement (LEMOA), the Communications Compatibility and Security Agreement, and the Basic Exchange and Cooperation Agreement for Geospatial Intelligence—have been in negotiations for years. The LEMOA was finally signed in August 2016, while the other two agreements remain sticking points in the relationship. From India’s point of view, the agreements have been controversial; for the United States, the failure to conclude the agreements has impeded further growth in its defense ties with India. This paper explains the legal requirement for the agreements, provides analysis of the relevant legal texts, examines India’s strategic and operational concerns, and offers recommendations to further bilateral defense relations.

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## Executive Summary

The United States has tried unsuccessfully for years to persuade India to sign three foundational agreements intended to facilitate interoperability between their respective militaries and to further enhance defense ties. The Logistics Exchange Memorandum of Agreement (LEMOA) finally saw forward movement in 2016 through the finalization of the agreement text in the spring and its signing on August 29, 2016, during a visit to Washington by Defense Minister Manohar Parrikar. However, the other two agreements—the Communications Compatibility and Security Agreement (COMCASA) and the Basic Exchange and Cooperation Agreement (BECA) for Geospatial Intelligence—remain in negotiation. From the U.S. perspective, these are all based on routine agreements that Washington has signed with dozens of countries, but they have been subject to criticism in India. Much has been written about these agreements, but the literature is lacking in certain respects. There is little public analysis of the standard legal text, explanation of the U.S. legal requirement for the agreements, or legal assessment of Indian concerns. The purpose of this study is to fill this gap, in particular by examining the soundness of Indian concerns from a U.S. legal perspective with additional historical and comparative insights.

The chief concern that critics express is that the agreements imperil India's long-held foreign policy of strategic autonomy (for example, by paving the way for U.S. bases or ports in Indian territories, or unduly binding India to U.S. systems and procedures). However, a review of the dozens of countries with which the United States has completed the agreements shows that other large, non-aligned countries such as South Africa and Indonesia have signed the agreements while maintaining both national sovereignty and positive relations with Washington. Furthermore, the proposed agreements—and the broader U.S.-India relationship—bear no resemblance to the basing agreements that have been the subject of disagreement between the United States and some of its allies. The LEMOA, COMCASA, and BECA agreements merely provide a legal framework for the transfer of logistical supplies, communications security systems, and geospatial data, respectively, without requiring India to obtain these items and systems from the United States.

We also found that the text of related foundational agreements and their use in practice undercut many of the other strategic and operational concerns expressed by Indian policymakers, defense officials, and analysts. The most notable of these concerns is that implementation of the COMCASA would involve data-sharing that could reveal the location of Indian military assets to Pakistan or other third parties.

But, as our study confirmed, U.S. data feeds to foreign governments can be modified, so the United States could restrict access by India and Pakistan such that their communications and information would not be shared with each other despite using a common platform with the United States. Another criticism is that the agreements primarily benefit the United States, but we argue that the LEMOA would lower the Indian military's operational costs and that much of the data shared under the BECA and the COMCASA are contributed by the United States and provided at virtually no cost to India. Finally, we consider the criticism that workarounds and case-by-case solutions have obviated the operational need for these agreements. From a legal perspective, a reliance on ad-hoc arrangements can be problematic for U.S. commanders; from an operational perspective, continued use of workarounds in the absence of these frameworks will limit the range of options available to both Indian and U.S. commanders, particularly in responding to unforeseen circumstances.

Our study produced several recommendations to further bilateral defense relations. Future negotiations should be conducted at the appropriate level to insulate negotiations from politicization and to obviate criticisms that such agreements are out of the ordinary. In fact, the foundational agreements are routine, and their negotiation is normally conducted at a much lower level than they have been in the case of India. These are merely framework agreements that facilitate exchanges of certain defense articles and services and do not limit India's freedom of action. In fact, having the agreements "on the shelf" preserves India's greatest operational flexibility. U.S. officials should help their Indian counterparts understand the legal constraints under which U.S. commanders often operate, particularly in the exchange of goods and services. U.S. officials negotiating these agreements are similarly operating in a complex legal environment and must ensure that the agreements satisfy specific U.S. legal requirements. U.S. officials should continue to exercise patience, understand that the defense relationship has developed rapidly from the Indian perspective, and be sensitive to India's desire to maintain its strategic autonomy.



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## Glossary

ACSA	Acquisition and Cross Servicing Agreement
ADA	Anti-Deficiency Act
AECA	Arms Export Control Act (22 U.S.C. Chapter 39)
BECA	Basic Exchange and Cooperation Agreement for Geospatial Intelligence
C4ISR	Command, Control, Communications, Computer Intelligence, Surveillance and Reconnaissance
CISMOA	Communications and Information Security Memorandum of Agreement
CJCSI	Chairman of the Joint Chiefs of Staff Instruction
COMCASA	Communications Compatibility and Security Agreement
COMSEC	Communications Security
CSIS	Center for Strategic and International Studies
DOD	Department of Defense (United States)
DOS	Department of State (United States)
DTTI	Defense Technology and Trade Initiative (United States)
FMS	Foreign Military Sales
G-77	Group of 77
GAO	Government Accountability Office
GSOMIA	General Security of Military Information Agreement
ITAR	International Traffic in Arms Regulations (22 CFR 120-130)
LEMOA	Logistics Exchange Memorandum of Agreement
LSA	Logistics Support Agreement
MDA	Maritime Domain Awareness
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NIMA	National Imagery and Mapping Agency
NGA	National Geospatial-Intelligence Agency (United States)
OAS	Organization of American States
PACOM	Pacific Command (United States)

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# Introduction

## Objective

The purpose of this paper is to consider concerns expressed in Indian analytical literature about three defense agreements proposed by the United States and to assess these concerns from a U.S. legal perspective.<sup>1</sup> The three agreements—the Logistics Exchange Memorandum of Agreement (LEMOA), the Communications Compatibility and Security Agreement (COMCASA), and the Basic Exchange and Cooperation Agreement for Geospatial Intelligence (BECA)—have been in negotiations for years. While the United States considers these to be routine defense agreements, they have been met with skepticism and even opposition by some in the Indian national security establishment. This paper provides the legal context for the agreements, and identifies and assesses Indian concerns from a U.S. legal perspective. To that end, it also explores the U.S. Department of Defense's (DOD's) perspective on the agreements and examines comparative country cases to provide additional insight.

## The agreements in the context of U.S.-India relations

After World War II, U.S.-India relations were neutral because India chose not to become entangled in the politics of the Cold War. Its first prime minister, Jawaharlal Nehru, instead opted for a foreign policy of non-alignment with either the West or the Soviet Union.<sup>2</sup> This policy led India to become a leader in the formation of the

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<sup>1</sup> This analysis is one of three reports for a CNA study of U.S.-India naval and defense cooperation. For the other reports, see Nilanthi Samaranayake, Michael Connell, and Satu Limaye, *The Future of U.S.-India Naval Relations*, CNA, 2017; and Satu Limaye, *Weighted West, Focused on the Indian Ocean and Cooperating across the Indo-Pacific: The Indian Navy's New Maritime Strategy, Capabilities, and Diplomacy*, CNA, 2017.

<sup>2</sup> Although India did not enter into a formal alliance with either the United States or the Soviet Union, it did maintain relations with both superpowers. During the Cold War, India procured

Non-Aligned Movement (NAM) and the Group of 77 (G-77),<sup>3</sup> a related coalition of 77 developing nations. The G-77 was most effective when operating as a voting bloc. For example, in the negotiation of the 1982 United Nations Convention on the Law of the Sea, it was instrumental in ensuring that developing countries would receive both technical assistance and financial remuneration from the proceeds of deep seabed mining. India's foreign policy of "strategic autonomy" has its roots in this history of non-alignment. In the last 20 years, however, it has sought to develop closer relations with the United States as a result of the end of the Cold War and the rise of China. This has led to what both countries consider a strategic partnership, evidenced by significantly greater bilateral trade and investment and the 2016 declaration of India as a "Major Defense Partner"<sup>4</sup> of the United States.

Following years of neutrality, relations between the United States and India reached their nadir in 1998, following India's Pokhran II nuclear tests. The tests led to U.S. sanctions and a strong rebuke from the Clinton administration, which had been caught off-guard by the tests. The relationship gradually began to warm toward the end of the Clinton administration as a result of burgeoning economic ties and a visit by President Clinton to India in March 2000. Terrorist attacks against the United States on September 11, 2001, and against the Indian parliament in December of the same year, precipitated a rapid thaw in the overall relationship.

Responding to India's offers of assistance following the 9/11 attacks, President Bush waived the sanctions that had been imposed on India as a result of its nuclear tests. The defense relationship advanced further in 2002 when, after 15 years of negotiations, the United States and India concluded a General Security of Military Information Agreement (GSOMIA), another defense foundational agreement. The

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many of its military platforms from the Soviet Union, and its military officers were sometimes educated or trained in the Soviet Union. The Communist Party of India (Marxist) continues to be active in India's domestic politics, particularly in Kerala and West Bengal. By contrast, India's relations with the United States were periodically strained as a result of positive U.S. relations with Pakistan. These factors partly account for suspicions of U.S. motivations and a sense of the United States as an unreliable partner by a certain segment of the Indian national security establishment.

<sup>3</sup> The G-77 was established on June 15, 1964, via the signature of the "Joint Declaration of Seventy-Seven Developing Countries" at the end of the first session of the United Nations Conference on Trade and Development in Geneva. See "About the Group of 77" by the Group of 77 at the United Nations. As of September 14, 2016, <http://www.g77.org/doc/>. The G-77 remains an important intergovernmental organization within the United Nations structure and tends to operate a "block vote" in international negotiations.

<sup>4</sup> Office of the Press Secretary, "Joint Statement: The United States and India: Enduring Global Partners in the 21st Century." The White House, June 7, 2016. As of September 14, 2016, <https://www.whitehouse.gov/the-press-office/2016/06/07/joint-statement-united-states-and-india-enduring-global-partners-21st>.



GSOMIA facilitated opportunities for greater intelligence sharing between India and the United States, and was followed by the resumption of bilateral military exercises that had begun in the 1990s, including the MALABAR naval exercise that continues today. The GSOMIA was also signed in the context of India's efforts to diversify its defense trade partners in the late 1990s and early 2000s, following a period in which Indian defense officials were forced to scramble in order to procure spare parts for Russian-built platforms in the wake of the Soviet Union's collapse.

Since then, Washington and New Delhi have made strides in their formal defense relations with the signing of the New Framework for Defense Cooperation in 2005 and the 2012 U.S. Defense Technology and Trade Initiative (DTTI), a "flexible mechanism" to ensure that senior leaders are involved in finding opportunities for science and technology cooperation (to include co-production) and moving away from the traditional "buyer-seller" dynamic.<sup>5</sup> More recently, the "New Framework" understanding was renewed in 2015<sup>6</sup> by the U.S. Secretary of Defense and the Indian Minister of Defense to underscore the importance of the DTTI and to establish additional cooperation groups to find concrete measures to strengthen U.S.-India defense trade.

Over this period, the U.S.-India defense relationship has become a reality rather than existing only on paper. In addition to more frequent high-level exchanges, cooperation on military exercises has grown to the point that no country holds more annual exercises with India than the United States, and cumulative defense trade has blossomed from "virtually zero to more than \$8 billion."<sup>7</sup> As an adjunct of this

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<sup>5</sup> Office of the Under Secretary of Defense, "U.S.-India Defense Technology and Trade Initiative," Office of the Under Secretary of Defense for Acquisition, Technology and Logistics. As of August 30, 2016, <http://www.acq.osd.mil/ic/DTTI.html>.

<sup>6</sup> Ashton Carter and Manohar Parrikar, "Framework for the U.S.-India Defense Relationship." Government of the United States of America and Government of India, June 3, 2015, <http://archive.defense.gov/pubs/2015-Defense-Framework.pdf>. Sales of dual-use technologies (regulated by the U.S. Department of Commerce) are mostly in the aerospace field and totaled \$2.9 billion in 2013. Kevin J. Kurland, "End-Use Monitoring and Effective Export Compliance," U.S. Department of Commerce, Bureau of Industry and Security, 2014. As of July 25, 2016, [https://www.bis.doc.gov/index.php/forms-documents/doc\\_view/1017-diversion-end-use-monitoring-concerns-and-best-practices2](https://www.bis.doc.gov/index.php/forms-documents/doc_view/1017-diversion-end-use-monitoring-concerns-and-best-practices2).

<sup>7</sup> The Center for Strategic and International Studies (CSIS) summarizes the U.S.-India defense relationship as one that has grown over the last decade, such that "India now holds more annual military exercises with the United States than any other country." CSIS also reports that "cumulative defense sales have grown from virtually zero to more than \$8 billion and high-level exchanges on defense issues have increased substantially." *U.S.-India Security and Defense Cooperation*, Center for Strategic and International Studies. As of August 30, 2016, <https://www.csis.org/programs/wadhwani-chair-us-india-policy-studies/past-india-chair-projects/us-india-security-and>.

growing defense trade, the United States concluded an End Use Agreement—negotiated pursuant to Article 41 of the Arms Export Control Act (AECA)<sup>8</sup>—with India in 2009 to ensure that there is end-use monitoring and no retransfers of defense articles when sold either via a Foreign Military Sales (FMS) case or via export license.<sup>9</sup>

Yet, three other so-called “facilitating”<sup>10</sup> agreements—(1) the Logistics Exchange Memorandum of Agreement, a modified version of a Logistics Support Agreement (LSA), also commonly known as an Acquisition and Cross-Servicing Agreement (ACSA); (2) the Communications Compatibility and Security Agreement, commonly known as the Communications and Information Security Memorandum of Agreement (CISMOA); and (3) the Basic Exchange and Cooperation Agreement for Geospatial Intelligence—have remained controversial.

From the U.S. perspective, the delay in their completion has impeded further growth in the defense relationship. Despite years of negotiations, only the LEMOA has been signed.<sup>11</sup> While the defense relationship between the United States and India has

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<sup>8</sup> According to Dr. P.K. Ghosh, a retired Indian Navy officer and current senior fellow of the Observer Research Foundation in New Delhi, there was a contentious history with that agreement because India was opposed to U.S. in-country efforts to monitor the ultimate disposition of the military systems that it sold. Ghosh asserted that India “reluctantly signed the End-User Monitoring (EUM) Agreement after much U.S. pressure.” He states that India, after extended negotiations, was able to gain assurances that “intrusive ‘monitoring’ American inspectors would stay away from Indian military bases.” It should be noted that end-use monitoring is a longstanding legal requirement that is part of both domestic U.S. law (the Arms Export Control Act) and general international law. End-use monitoring is used to satisfy U.S. international commitments that it does not engage in the proliferation of arms to other countries without a legitimate self-defense need and that the arms transferred will not be retransferred to third countries without U.S. consent. P.K. Ghosh, “Are Technical Defense Agreements with U.S. beneficial for India?” *Raisina Debates*, Observer Research Foundation, April 28, 2016. As of September 14, 2016, <http://www.orfonline.org/expert-speaks/are-technical-defence-agreements-with-us-beneficial-for-india/>.

<sup>9</sup> Robert S. Metzger, “US-India Defence Cooperation,” *Indian Defence Review* 27, no. 2 (April/June 2012): 63. As of August 30, 2016, <http://www.rjo.com/PDF/US-IndiaDefenceCooperation.pdf>.

<sup>10</sup> In the April 2016 joint statement between Secretary of Defense Ashton Carter and Defence Minister Manohar Parrikar, the two countries began referring to U.S.-India foundational agreements as the “facilitating agreements.” U.S. Department of Defense, “India-United States Joint Statement on the visit of Secretary of Defense Carter to India April 10-13, 2016,” Press Release, U.S. Department of Defense, April 12, 2016. As of August 30, 2016, <http://www.defense.gov/News/News-Releases/News-Release-View/Article/718589/india-united-states-joint-statement-on-the-visit-of-secretary-of-defense-carter>.

<sup>11</sup> The Voice of America reported on August 29, 2016, that the agreement had been signed during a visit to Washington by Defense Minister Manohar Parrikar. Carla Babb, “Indian Defense Minister Signs Major Logistics Agreement with Pentagon,” Voice of America. As of August 29, 2016, <http://www.voanews.com/a/indian-defense-minister-visits-pentagon/3485114.html>. The

grown substantially over the last 15 years in spite of a lack of these foundational agreements, completion of the agreements would allow the countries to do more. The absence of COMCASA and BECA agreements has affected the functionality of U.S. platforms sold to India (such as P-8I aircraft) and limits interoperability and data-sharing between their militaries. Workarounds have solved some issues on a temporary basis to allow certain exchanges or exercises to proceed, but do not allow for broader cooperation or account for unforeseen circumstances that may arise.

What legal concerns drive the U.S. desire to sign the agreements, and what accounts for India's reluctance? Are the agreements truly necessary to continue advancing the U.S.-India defense relationship? To answer these questions, this paper will first look at the terms of those agreements. Because the draft texts of the specific agreements are not publicly available, the paper will endeavor to put them in the context of the types of general legal agreements that DOD must conclude in order to have an effective defense relationship with another country while also meeting its obligations under U.S. law. These "foundational agreements" are the basis for the "facilitating agreements" that the United States has sought to conclude with India. The paper will then explain the legal requirements for the agreements from the U.S. perspective; identify the key concerns that have been raised by Indian policymakers, military officers, and national security analysts; and provide an assessment of these concerns from a U.S. legal perspective. The paper concludes with recommendations to further bilateral defense relations.

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LEMOA was agreed to in principle by Secretary of Defense Carter and Minister of Defence Parrikar in April 2016, and the joint statement of President Obama and Prime Minister Modi in June 2016 indicated that the language had been finalized. See: "India-United States Joint Statement on the visit of Secretary of Defense Carter to India April 10-13, 2016," 2016. See also: "Joint Statement: The United States and India: Enduring Global Partners in the 21st Century," 2016. At the time of publication, the language of the agreement had not been made public. As a result, legal analysis of the LEMOA is based on previous ACSA agreements, on which the LEMOA is based.

## Defining the Foundational Agreements

To understand the nature of these agreements and their drivers, it is essential to understand the legal authority under which these agreements are concluded, what the agreements accomplish in practice, and the impact on the Indian military if the remaining agreements do not move forward. This section defines the foundational agreements in these terms. The texts of the India-specific agreements are not publicly available, so this section analyzes the types of agreements on which the India-specific agreements are based (i.e., ACSA and CISMOA agreements are analyzed in order to provide context for the LEMOA and COMCASA agreements, respectively). Other BECA agreements are analyzed in place of the India-specific BECA.

Table 1 summarizes what CNA has determined to be the relevant legal, negotiating, and implementing authorities for these types of agreements.

Table 1. Authorities typically underlying the U.S. foundational agreements

	ACSA	CISMOA	BECA
<b>Basic purpose</b>	Enable deployed forces to share logistics support to meet unforeseen requirements that might arise in the field or unanticipated mission requirements.	Provide the legal mechanism to exchange command, control, communications, computer intelligence, surveillance and reconnaissance (C4ISR) data to a foreign country, establish secure communications channels, and exchange communications supplies and services.	Enable the sharing of a range of geospatial products, including access to mapping and hydrographic data, flight information products, and the U.S. National Geospatial-Intelligence Agency's geospatial information bank.
<b>Legal authority</b>	ACSA authority in 10 U.S.C. §'s 2341-2350	10 U.S.C. § 2350f (for the exchange of telecommunication supplies and services) and 10 U.S.C. § 421 (for communications security, cryptologic support, and standards for accountability)	10 U.S.C. § 454
<b>Negotiating authority</b>	The master agreements are negotiated by the Office of the Secretary of Defense.	The Chairman of the Joint Chiefs of Staff has primary responsibility delegated to U.S. combatant commands. <sup>a</sup> Other agencies may also be involved.	National Imagery and Mapping Agency (NIMA)
<b>Implementing authority</b>	U.S. combatant commands and all other DOD components (including the Services) in the form of Implementing Agreements	U.S. combatant commands. (Other agencies may also be involved.)	NIMA and military mapping and weather agencies

Source: CNA.

a. Chapter 3, "Technology Transfer and Disclosure," in *Security Assistance Management Manual*, Defense Security Cooperation Agency. As of September 14, 2016, <http://www.samm.dscm.mil/chapter/chapter-3>.

## Acquisition and Cross-Servicing Agreements

The LEMOA agreement, despite its unusual title, is an agreement concluded pursuant to the ACSA authority in 10 U.S.C. §'s 2341-2350.<sup>12</sup> ACSA transactions must take place pursuant to an “agreement under which the United States agrees to provide logistics support, supplies, and services to military forces of a country...in return for the reciprocal provisions of logistic support, supplies, and services by such government or organization to elements of the armed forces.”<sup>13</sup>

Under the controlling DOD Directive 2010.9 of April 28, 2003, the Office of the Secretary of Defense negotiates the master agreements, but the U.S. combatant commanders and all other DOD components (including the Services) implement these agreements in the form of Implementing Agreements that must conform to the detailed procedures set forth in the Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 2120.01.

The LEMOA agreement is an umbrella agreement under the ACSA authority that creates the legal and fiscal framework for implementing arrangements. These implementing agreements can be done transactionally to cover a wide range of logistics support during an exercise or operation, or to cover the transfer or exchange of specific items of logistical support.

The United States has signed ACSA or LSA agreements both with allies and with partners. According to the U.S. State Department's Treaties in Force, as of January 1, 2015, the United States has entered into ACSA or LSA agreements with 88 countries around the world, as well as with North Atlantic Treaty Organization (NATO) entities and the United Nations. In South Asia, Washington has completed ACSA agreements with Afghanistan, the Maldives, Pakistan, and Sri Lanka.<sup>14</sup>

The basic purpose of the ACSA agreements is to enable deployed forces to share logistics support to meet unforeseen requirements that might arise in the field or unanticipated mission requirements. By enabling countries to “plug in” to the logistics systems of the other country, considerable costs are avoided since each country provides support to the other on a quid pro quo basis in which there are no surcharges or markups on the costs of the logistics supplies and services provided.

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<sup>12</sup> CNA discussion with U.S. defense official, 2016.

<sup>13</sup> 10 U.S.C. § 2342(a) (2).

<sup>14</sup> “Treaties in Force,” U.S. Department of State, January 1, 2013, and supplement dated January 1, 2015. As of September 14, 2016, <http://www.state.gov/s/l/treaty/tif/index.htm>.

Exchanges of equal value or replacements in kind are permitted to balance the accounts; however, if there is an imbalance, there is an annual reconciliation of the exchange accounts.<sup>15</sup> Such logistics support “transfers” come into play primarily during wartime, combined exercises, training, deployments, contingency operations, humanitarian or foreign disaster relief operations, or certain peace operations under the United Nations Charter, or for unforeseen or exigent circumstances. As a result, the ACSA authority is almost always exercised by the unified combatant commands. Although the delay by the parties in completing the LEMOA agreement did not prevent the exchange of fuel, for example,<sup>16</sup> the conclusion of this agreement will enable the deployed forces to exchange a much broader range of logistical support, including the following:

The term “logistic support, supplies, and services” means food; billeting; transportation (including airlift); petroleum; oils; lubricants; clothing; communications services; medical services; ammunition; base operations support (and construction incident to base operations support); storage services; use of facilities; training services; spare parts and components; repair and maintenance services; calibration services; and port services. Such terms include temporary use of general purpose vehicles and other nonlethal items of military equipment which are not designated as significant military equipment on the United States Munitions List promulgated pursuant to section 38(a)(1) of the Arms Export Control Act.<sup>17</sup>

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<sup>15</sup> As a practical matter, every effort is made to balance these accounts by means of exchanging goods of equal value so that cash does not need to exchange hands. If a country has to pay for the other’s logistical support, it pays the same price as the providing armed force. This is a large benefit since it results in “national” pricing for items that are exchanged.

<sup>16</sup> Fuel is a popular commodity that is often exchanged under the ACSA authority. In 2015, the U.S. Defense Logistics Agency and the Indian Navy renewed a separate fuel exchange agreement that allows each party to make use of the other’s bulk fuel petroleum supplies. The conclusion of a separate fuel agreement may explain the lack of a sense of urgency to complete the umbrella LEMOA agreement that authorizes a much broader set of logistics supplies and services. Christopher Goulait, “DLA Energy, India sign international agreement,” DLA Energy Public Affairs Press Release, March 2, 2016. As of September 14, 2016, <http://www.publicnow.com/view/2EC72994261AB23CA70CB42A8CBC8DB9AEB8C53E?2016-03-03-14:30:50+00:00-xxx1731>. A joint statement during the visit of Minister of Defence Parrikar to Hawaii in December 2015 also notes that the two sides “welcomed the renewal of the fuel exchange agreement.” “US-India Joint Statement on the visit of Minister of Defence Manohar Parrikar to the United States,” Press Release Number NR-468-15, Press Operations, DOD, December 10, 2015. As of September 15, 2016, <http://www.defense.gov/News/News-Releases/News-Release-View/Article/633748/us-india-joint-statement-on-the-visit-of-minister-of-defence-manohar-parrikar-t>.

<sup>17</sup> 10 U.S.C. § 2350(1).

As noted above, the LEMOA agreement recently completed with India is a framework agreement. There are likely no specific promises to supply particular items or types of logistical support. Rather, these types of agreements create the framework for the exchange and establish boundary conditions for the types of supplies and services that can be exchanged outside of the FMS system and its associated requirements for full reimbursement of all costs related to the provision of the supplies and services, including transport, administration, and most development costs. Also, implementation of this ACSA program is via the U.S. combatant commanders; therefore, India would normally interface with U.S. Pacific Command (PACOM) or a military service on most of its ACSA transactions.

The lack of an ACSA agreement such as the LEMOA previously limited opportunities for cooperation in logistics. With the LEMOA now in place, the United States is no longer prevented from providing resupply to Indian ships that are in transit or participating in “authorized port visits, joint exercises, joint training, and humanitarian assistance and disaster relief efforts.”<sup>18</sup>

## Basic Exchange and Cooperation Agreements for Geospatial Intelligence

The underlying authority for BECA agreements is 10 U.S.C. § 454.<sup>19</sup> That authority, which was originally directed at the defunct Defense Mapping Agency, provides that the secretary of defense may “exchange or furnish mapping, charting, and geodetic data, supplies and services to a foreign country....*pursuant to an agreement* for the production or exchange of such data.”<sup>20</sup> (Emphasis supplied.)

The conclusion of the agreement would allow India to access a range of topographical, nautical, and aeronautical data, engage in subject matter expert exchanges, and receive training at the U.S. National Geospatial Intelligence College.<sup>21</sup>

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<sup>18</sup> “India and the United States Sign the Logistics Exchange Memorandum of Agreement (LEMOA),” Press Information Bureau, Government of India, August 30, 2016. As of September 27, 2016, <http://pib.nic.in/newsite/mbErel.aspx?relid=149322>.

<sup>19</sup> CNA discussion with U.S. government official, 2016.

<sup>20</sup> 10 U.S.C. § 454

<sup>21</sup> “India will eventually ink other agreements pushed by US: Manohar Parrikar,” Press Trust of India, August 30, 2016. As of September 29, 2016, <http://indianexpress.com/article/india/india-news-india/india-will-eventually-ink-other-agreements-pushed-by-us-manohar-parrikar-3003315/>.



Of particular interest to India is access to the U.S. National Geospatial-Intelligence Agency's (NGA's) "geospatial information bank."<sup>22</sup>

The BECA agreement also enables India to be able to receive advanced navigational aids and avionics on U.S.-supplied aircraft. To date, the absence of an agreement has affected the navigational and flight management systems that India could procure for its purchase of C-17, C-130J, and P8-I aircraft.<sup>23</sup>

The agreement's terms would likely envision reciprocal exchanges of data for defense, peacekeeping, or humanitarian assistance reasons without any payments of royalties or license fees and are designed to facilitate mutual technical assistance and joint gathering of data (including hydrographic data in uncharted waters via surveys).<sup>24</sup> The usual terms also provide for joint visits of people involved in implementing projects under the agreement, no commercial or third-party transfers of the data exchanged, and the usual boilerplate language in DOD agreements to mutually waive claims and resolve any disputes through negotiation.

BECA agreements are intended to function as umbrella agreements wherein various components of DOD/NGA and their Indian counterparts would conclude subsidiary arrangements on a one-time or semi-permanent basis for exchanges of specific types of data and data feeds. Examples include data exchange of mapping data for a particular exercise or agreement, mapping data to produce aeronautical and nautical charts, mapping data to support a particular defense system, or an agreement to conduct a joint hydrographic survey in an area that is uncharted. These framework

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<sup>22</sup> R.K. Sharma, *Proposed U.S. Foundational Agreements between the U.S. and India*, Center for Air Power Studies, Paper No. 56/16, May 13, 2016. As of September 14, 2016, [http://capsindia.org/files/documents/CAPS\\_Infocus\\_RK\\_SHARMA\\_00.pdf](http://capsindia.org/files/documents/CAPS_Infocus_RK_SHARMA_00.pdf).

<sup>23</sup> Ajai Shukla, "US high-tech arms to India stumble on safeguards," *Business Standard*, May 25, 2010. As of September 29, 2016, [http://www.business-standard.com/article/economy-policy/us-high-tech-arms-to-india-stumble-on-safeguards-110052500033\\_1.html](http://www.business-standard.com/article/economy-policy/us-high-tech-arms-to-india-stumble-on-safeguards-110052500033_1.html).

<sup>24</sup> The draft agreement with India was not available for review. The authors did review a publicly-available copy of the BECA agreement with the Republic of Korea (2010) to confirm the basic terms that are likely present in the draft BECA agreement with India. The author, Mark Rosen, has previously negotiated and concluded agreements of this type for the Department of the Navy, including agreements for the production and exchanges of nautical information for the production of charts and cooperative gathering of hydrographic information. "Basic Exchange and Cooperation Agreement Between the National Geospatial-Intelligence Agency of the Department of Defense of the United States of America and the Korean Defense Intelligence Agency of the Ministry of National Defense and the Science and Technology Bureau of the National Intelligence Service of the Republic of Korea concerning Geospatial Intelligence," signed November 11, 2010. As of December 20, 2016, <http://www.state.gov/documents/organization/159462.pdf>.

agreements almost always<sup>25</sup> specify that no specific transactions are mandated and that the parties are free to mutually agree on those transactions which, at the time, make sense. Based on a review of active agreements registered with the U.S. Department of State (DOS), the U.S. government has BECA or similar geospatial or mapping data-sharing agreements with 57 countries, including partners such as Indonesia (1977 general mapping) and allies such as France (2006 geospatial-intelligence exchanges).<sup>26</sup>

## Communications and Information Security Memorandums of Agreement

CISMOA agreements—like the COMCASA being negotiated with India—are intended to provide the documentary justification to release command, control, communications, computer intelligence, surveillance, and reconnaissance (C4ISR) data to a foreign country. This includes data feeds that provide the “common operational/tactical picture.”<sup>27</sup> Also included within the scope of this general program are topics such as configuration management; common standards; information security; information assurances; authority to engage in reciprocal use of each other’s communications systems; the framework for exchanging telecommunications support; and the services related to establishing an interconnection. CISMOA agreements are separate from information security agreements that are negotiated by the U.S. National Security Agency to enable access to secure networks.

These agreements address a number of issues related to communications interoperability and are a bit more prescriptive than pure framework agreements

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<sup>25</sup> CNA reviewed the 2010 BECA for the Republic of Korea to confirm the basic terms that are likely present in the draft BECA agreement with India. The author has previously negotiated and concluded agreements of this type for the Department of the Navy. The author believes that these agreements all follow the same basic template to expedite their interagency review and review by Congress.

<sup>26</sup> “Treaties in Force,” U.S. Department of State, January 1, 2013, and supplement dated January 1, 2015. As of September 14, 2016, <http://www.state.gov/s/l/treaty/tif/index.htm>.

<sup>27</sup> Defense Security Cooperation Memo, 06-54 [*Security Assistance Management Manual E-Change 59*] of March 23, 2007. As of December 20, 2016, <http://www.samm.dsca.mil/policy-memoranda/dsca-06-54>. See also: Ajai Shukla, “India-U.S. communication pact faces uphill climb,” *Business Standard*, September 6, 2016. As of September 16, 2016, [http://www.business-standard.com/article/current-affairs/india-us-communication-pact-faces-uphill-climb-116090500698\\_1.html](http://www.business-standard.com/article/current-affairs/india-us-communication-pact-faces-uphill-climb-116090500698_1.html).

such as ACSA<sup>28</sup> and BECA agreements, although many of the actual terms are spelled out in specific annexes that can be included (or not) based on the nature of the defense relationship. Though the language of the COMCASA has not been agreed to and is not publicly available for analysis, two legal authorities are typically implicated in CISMOAs. First, CISMOAs can serve as the authority for DOD to be able to exchange telecommunications supplies and provide services under 10 U.S.C. § 2350f pursuant to a *bilateral or multilateral arrangement* that is premised on the exchange of communications support and related supplies and services of equivalent value.<sup>29</sup> An agreement under this section would be subject to concurrence by the secretary of state. Issues pertaining to configuration management (as well as to tactical command and control standards, interoperability procedures, configuration management documentation, and other technical detail components of the agreement) can be mapped to the Section 2350f authority, as well as to any specific agreements to allow the other country access to the others' telecommunications systems for its own purposes. That is, a country can “piggyback” on the telecommunications systems of the other country, to include landline and satellite access. The CISMOA agreements that are publicly available for review have a heavy emphasis on the joint adoption of written standards for interoperable communications.<sup>30</sup>

Second, the portions of the CISMOA relating to communications security (COMSEC)—including furnishing COMSEC materials, cryptologic support, standards for accountability, and COMSEC account management—are based on 10 U.S.C. § 421.

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<sup>28</sup> This analysis is based on the author's general knowledge of international telecommunications, configuration management, and cryptological exchange agreements that DOD enters into. The draft agreement with India was not available for review by CNA. The analysis that follows assumes standard terms and conditions and was verified via a review of the CISMOA Agreement between DOD and the Korean Ministry of National Defense of 2008. The J-6 at PACOM signed the agreement for DOD, which is consistent with Defense Security Cooperation Agency guidance. “Memorandum of Agreement Between United States Department of Defense and Republic of Korea Ministry of National Defense Concerning Communications Interoperability and Security,” signed October 27, 2008. As of September 14, 2016, <http://www.state.gov/documents/organization/121135.pdf>.

<sup>29</sup> Under 10 U.S.C. § 2350f(b), credits and liabilities need to be finally liquidated within 30 days after the end of the term of the arrangement (which cannot exceed 5 years). This provision is implemented in CJCSI 6740.01C, “Military Telecommunications Agreements and Arrangements between the U.S. and Regional Defense Organizations and Friendly Countries” of January 18, 2013.

<sup>30</sup> “Memorandum of Agreement Between United States Department of Defense and Republic of Korea Ministry of National Defense Concerning Communications Interoperability and Security,” 2016.

That statute authorizes DOD to negotiate and conclude bilateral “arrangements”<sup>31</sup> to enable the secure transmission of intelligence and communications security. This particular statute is unique in that it even allows for DOD to pay most of the costs of providing COMSEC materials and training to a receiving country.

Because many U.S. systems rely upon the use of COMSEC to ensure their safety, security, and functionality, U.S. policy on the sale of systems that include U.S. COMSEC requires a CISMOA agreement.<sup>32</sup> In such cases, the CISMOA provides the legal framework for the transfer of COMSEC associated with the hardware and software systems being sold. Terms and conditions that are specific to the COMSEC being furnished in conjunction with a system sale are often specified in separate annexes or stand-alone instruments. CISMOAs are not to be confused with foreign military sales documents.

The United States has multiple agreements concerning configuration management of tactical command, control, and communications standards, including with allies such as France (various) and partners such as Singapore (since 1991). The absence of the COMCASA forced India to supply mostly its own communications equipment in its recent purchases of P-8I and C-130J aircraft.<sup>33</sup> In those cases, the impacts upon India were that only commercial-grade communications systems could be sold to India, and there were some compromises in U.S.-India interoperability, to include (one can safely assume) the ability to have secure communications.<sup>34</sup> In the case of the P-8Is,

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<sup>31</sup> See generally, CJCSI 6510.06B, “Communications Security Releases to Foreign Nations” (Section A-6) of December 11, 2006, as amended, and CJCSI 6740.01C, “Military Telecommunications Agreements and Arrangements between the U.S. and Regional Defense Organizations and Friendly Countries” of January 18, 2013.

<sup>32</sup> See Chapters 3, 4, and 5 of the *Security Assistance Management Manual* regarding the policy for transfers of C4ISR capabilities, citing National COMSEC Instruction (NACSI) 6001, “Foreign Military Sale of Communications Security Articles and Services to Foreign Governments and International Organizations,” the text of which is not available for public release. As of December 20, 2016, <http://samm.dsca.mil/listing/chapters>. For example, “Prior to physically receiving any U.S. INFOSEC products or services associated with a secure C4ISR system, the purchaser must negotiate and sign a Communication Interoperability and Security Memorandum of Agreement (CISMOA) or other INFOSEC agreement (e.g., COMSEC MOU, INFOSEC Equipment Agreement) with the CCMD,” Chapter 3, Section 7.3.1, *Security Assistance Management Manual*, Defense Security Cooperation Agency, United States Department of Defense. As of December 20, 2016, <http://www.samm.dsca.mil/chapter/chapter-3>.

<sup>33</sup> Metzger, 2012, p. 64.

<sup>34</sup> Sharma, 2016, p. 1. See also: Shukla, 2016, and Darshana M. Baruah, “Expanding India’s Maritime Domain Awareness in the Indian Ocean,” *Asia Policy*, July 2016: 54. As of September 15, 2016, <http://www.nbr.org/publications/issue.aspx?id=336>. Dr. P.K. Ghosh, a retired Indian Navy officer, has argued that the impact is minimal: “The items were essentially secure communication equipment that assisted in encoded communication between U.S. platforms and those that were fitted on board their allies. Fortunately, the IAF [Indian Air Force] had

the absence of secure voice, Link-11, and Link 16 prevented Indian aircraft from participating in secure voice networks or having a common tactical picture during exercises or other operations with U.S. forces or other regional forces that that operate over these voice and data links.<sup>35</sup>

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rightly concluded that the absence of the equipment was unlikely to hamper the operational capability of these platforms in the generic sense and that they would just ensure that these platforms remained interoperable with U.S. forces with their communication protocol and codes.” Ghosh, 2016.

<sup>35</sup> Shukla, 2016.

## The Legal Requirement from the Perspective of the United States

An unfortunate reality for U.S. defense planners is that mission imperatives must often take a backseat to domestic legal concerns that are rooted in the U.S. Constitution and domestic law. These legalities place constraints on the powers of the executive branch and, by extension, DOD. These legal considerations come into play whenever DOD transfers defense articles and services to a foreign armed force or receives supplies and services from a foreign source. DOD Directive 5530.3 is the Defense Department's implementation of various DOS regulations<sup>36</sup> concerning the negotiation and conclusion of international agreements, to include the ACSA, BECA, and CISMOA described in previous sections. In a nutshell, all DOD officials must comply with both DOD directives and DOS regulations prior to entering into any legally or politically binding international agreements with a foreign government, in addition to complying with the underlying statute that supports the specific transaction being proposed. Federal statutes are the result of Acts of Congress, which the executive branch is responsible for implementing. Unless a federal statute includes a specific waiver that the president can invoke, the executive branch cannot deviate from the express terms of the statute without the assent of the Congress (usually part of the Constitutional Process of Treaty Ratification). Such actions are rare, particularly with regard to relatively low-level defense agreements

Absent specific legal authority, DOD is prohibited from transferring defense articles and services (including defense technical information), unless there is an underlying statutory authority and an implementing international agreement. At the most basic level, the prohibition against providing assistance—even non-lethal assistance that does not have any defense capabilities—is grounded in U.S. fiscal law principles that

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<sup>36</sup> The basic DOS regulation governing international agreements is Circular 175 or Circular 175 procedures. U.S. Department of State, "Circular 175 Procedure," Office of the Legal Adviser. As of September 14, 2016, <http://www.state.gov/s/l/treaty/c175/>. In addition to DOS coordination, DOD and all other agencies are required to report their agreements to the U.S. Congress under legislation popularly known as the Case-Zablocki Act of 1978, 1 U.S.C. § 112b. In that way, Congress can ensure that DOD and other agencies are only concluding agreements with proper statutory authority. If Congress disagrees with the agency's actions, it can withhold funding for implementation of the agreement or take other actions.

any expenditure of public funds and use of public property must be pursuant to law since Congress has the ultimate authority to authorize expenditures and regulate the armed forces.<sup>37</sup> There is the added requirement that any funds appropriated by Congress (and the materials that are purchased with appropriated funds) must be reasonably related to the *purpose* for which those funds were originally appropriated. Similarly, any obligations of funds to support DOD's participation in some activity (including those established in an international agreement) must be within the amounts that the U.S. Congress authorizes.<sup>38</sup>

Because defense materials and information are implicated in these agreements, Congress has imposed added legal restrictions to ensure that defense articles and services are transferred only to the countries that require those materials for their legitimate defense needs and to promote world peace. Consequently, to transfer defense articles and services, there must be both a statutory basis to effectuate a transfer *and* a bilateral understanding. This added requirement comes from Section 3 of the AECA, which denotes the following:<sup>39</sup>

No defense article or defense service shall be sold or leased by the United States Government under this chapter to any country or international organization, and no agreement shall be entered into for a cooperative project unless

1. The President finds that the furnishing of defense articles and defense services to such country or international organization

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<sup>37</sup> U.S. v. MacCollom 426 U.S. 317 at 321 (1976).

<sup>38</sup> 31 U.S.C. 1301 (a). The so-called Purpose Act does not necessarily apply to property transfers; however, as a practical matter, if DOD diverts property for a purpose other than reasonably intended by the appropriation, it will suffer consequences from the Congress or, perhaps, run afoul of other laws. The Purpose Act is enforced, vis-à-vis federal officials, via the Anti-Deficiency Act (ADA) 31 U.S.C. § 1341(a), § 1514(a). The ADA prohibits any government employee from making or authorizing an expenditure—by contract or binding international agreement—in excess of amounts available in an appropriation. There are penalties associated with violations of the ADA.

<sup>39</sup> The Arms Export Control Act is codified in Title 22 of the United States Code. Section 3 is codified at 22 U.S.C. § 2753. Section 2778(b)(2) similarly provides that “no defense articles or defense services designated by the President may be exported or imported without a license for such export or import, except that no license shall be required for exports or imports made by or for an agency of the United States Government (a) for official use by a department or agency of the United States Government, or (b) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.” Any violation of the provisions to transfer a defense article or service without proper authorization—commercial or otherwise—can result in substantial criminal penalties and fines. See 22 U.S.C. § 2778(c).

will strengthen the security of the United States and promote world peace;

2. The country or international organization shall have agreed not to transfer title to, or possession of, any defense article or related training or other defense service so furnished, and not to use or permit the use of such article, or related training, or other defense service for purposes other than those for which furnished unless the consent of the President has first been obtained;
3. The country or international organization shall have agreed that it will maintain the security of such article or service and will provide substantially the same degree of security protection afforded to such article or service by the United States Government; and
4. The country or international organization is otherwise eligible to purchase or lease defense articles or defense services.

To meet AECA requirements, transfers of defense articles (including information) and services can legally proceed in one of three ways: (a) pursuant to a government-to-government FMS transaction; (b) pursuant to a government-approved commercial export license; or (c) pursuant to a government-to-government international agreement that has an underlying statutory basis.<sup>40</sup> Export licenses must be approved by either the DOS for so-called International Traffic in Arms Regulations (ITAR) or Munitions List items, or by the Department of Commerce for dual-use technologies or exports to embargoed countries. By contrast, international agreements are used to (a) implement a legal authority authorizing a transfer; and (b) establish the necessary bilateral terms and conditions to effectuate the transfer.

FMS and export license transactions are DOD- and DOS-regulated, and those transactions are primarily designed to help the receiving country meet its national defense needs. By contrast, international agreements are generally used:

- To help a receiving country to meet its domestic national defense needs;<sup>41</sup> and

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<sup>40</sup> In general terms, U.S. government officials “acting in an official capacity” do not have to obtain an export license to transfer ITAR and other controlled items. See 22 U.S.C. § 2278(b)(1).

<sup>41</sup> The most important exceptions are so-called “cooperative agreements,” which are negotiated pursuant to Section 27 of the Arms Export Control Act (22 U.S.C. § 2767), and a variety of Title 10 provisions: 10 U.S.C. § 2350a, 10 U.S.C. § 2350l, and 10 U.S.C. § 2358. These types of



- To enable the receiving country to interact with DOD forces on an operational level since DOD personnel also lack the authority (outside of the terms of an international arrangement) to transfer costly defense articles or services to a receiving armed force, even if there is mutual benefit in the transaction.

The international agreements that are the subject of this paper are designed to facilitate the sharing of geospatial information (BECA), secure communications (CISMOA), and logistics supplies and services (ACSA) between headquarters and commanders in the field in order to facilitate a wide range of operational activities.

It bears repeating that outside of wartime or an imminent humanitarian disaster,<sup>42</sup> U.S. military commanders have neither the authority to provide defense articles and services nor the ability to receive such supplies and services without legal authority. This includes general humanitarian assistance.<sup>43</sup> As noted above, defense articles and services must be used consistently with their original purpose, and DOD officials cannot divert military resources for other purposes (i.e., there is no “military” or “operational exception” to the Purpose Rule or the Anti-Deficiency Act [ADA]).<sup>44</sup>

In the context of the three foundational agreements, it would be a violation of the Purpose Rule and the ADA for a military commander to transfer telecommunications, logistics support, or geospatial information unless there is an authority (and bilateral commitment) to do so. Depending on the nature of the violation, it may create criminal liability for the U.S. commander.<sup>45</sup> Furthermore, the United States does not have authority to receive funds, or other things of value, unless there is a statutory

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cooperative agreements are documented in international agreements that are designed to facilitate bilateral or multilateral cooperation in research and development, joint/cooperative production, and test and evaluation. For the most part, these types of international agreements can be considered adjuncts to the acquisition programs in the United States and in foreign countries, as opposed to more “operational” international agreements, such as ACSAs or Fuel Exchange Agreements, that are designed to facilitate joint logistics, training, or operations.

<sup>42</sup> There is a small emergency exception to the rule prohibiting U.S. military commanders from providing U.S. defense articles and services. This extends to the provision of non-lethal assistance in the humanitarian field to foreign recipients. DOD has a few standing programs and authorities to provide limited types of humanitarian assistance.

<sup>43</sup> The basic authority to provide humanitarian assistance is 10 U.S.C. § 401. It extends to specified items of assistance that are provided “in conjunction with authorized military operations.” This authority is not a blank check; the types of assistance are limited, and the circumstances in which it can be provided are likewise limited.

<sup>44</sup> The Government Accountability Office (GAO) has unequivocally ruled that the purpose statute does apply to military operations. See: To The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984), <http://www.gao.gov/products/422734#mt=e-report>.

<sup>45</sup> 31 U.S.C. § 1349.

authority to do so because of the prohibition in U.S. law against any agency (including DOD) augmenting its appropriations unless Congress has given the agency approval to receive reimbursement from a private source or a foreign government.<sup>46</sup> This would, for example, legally prevent a U.S. military commander from exchanging one type of logistics support for another outside of the context of an ACSA arrangement. In other words, the outbound transfer would probably violate AECA, and the inbound “reimbursement” would be an inappropriate augmentation of DOD appropriations.

Many find the provisions to be counterintuitive that DOD cannot receive outside assistance to defray its costs of operation; however, this rule is an extension of Congress’ constitutional authority to regulate the U.S. armed forces through its control of the purse strings. It is for this very reason that DOD lawyers put language in most international agreements that permits the reciprocal or equitable sharing of information or logistical supplies and services, as well as reimbursement schemes, so that the international agreement aligns with the statute.<sup>47</sup>

In short, U.S. defense officials face myriad complexities in engaging in relatively modest transactions. Most other countries do not have complex fiscal rules like those in the United States that constrain its armed forces in using its money or equipment. The notion that U.S. forces cannot accept supplies or services in peacetime from another government without running afoul of the rules against “augmentation of appropriations” is an alien concept to those outside of the United States. Many other countries also do not have the tradition of having to sign complex agreements to lay legal groundwork to borrow routine logistics supplies or share mapping data. Yet, this is what is necessary from the U.S. legal perspective. When faced with U.S. requests to enter into these transactions, countries can expect lawyers and diplomats to be involved; this is simply a “cost” of doing business with the United States. Until this is accepted, suspicions are bound to exist.

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<sup>46</sup> GAO, The Honorable Bill Alexander, B-213137, Jan 30, 1986 (unpublished) (popularly known as “Honduras II”).

<sup>47</sup> ACSA agreements are predicated on the reciprocal exchange of logistics supplies and services. When reciprocity is not possible within a given time to balance the accounts, DOD will seek reimbursement from the other government. To avoid the issue of augmentation of appropriations, there is a specific provision in the ACSA statute, 10 U.S.C. § 2346, that provides that any foreign “receipts” may be credited to the “appropriations, fund, or account” that was used in incurring the transaction with the foreign recipient. There are other Title 10 statutes with similar provisions.

## Assessing Indian Concerns Regarding the Foundational Agreements

The foundational agreements—now referred to as “facilitating agreements” by Washington and New Delhi as they relate to the India-specific agreements<sup>48</sup>—are routine from the U.S. perspective. However, the high level at which the facilitating agreements are being discussed and negotiated creates a vulnerability they will be politicized or face a higher degree of scrutiny by defense officials and national security analysts than is normally the case for these types of agreements. Attention to the facilitating agreements is perhaps also heightened because the growing U.S.-India defense relationship—including increased defense trade, military exercises, and calls for India to sign agreements—is relatively new and, from the perspective of some in India, occurring at a comparatively rapid pace. Indeed, discussion of the agreements in India has brought to the fore a number of concerns held by Indian policymakers, military officers, and analysts.

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<sup>48</sup> An April 2016 joint statement reads: “They expressed their desire to explore agreements which would facilitate further expansion of bilateral defense cooperation in practical ways. In this regard, they announced their in principle agreement to conclude a logistics exchange memorandum of agreement, and to continue working toward other facilitating agreements to enhance military cooperation and technology transfer.” “US-India Joint Statement on the visit of Minister of Defence Manohar Parrikar to the United States,” Press Release Number NR-468-15, Press Operations, U.S. Department of Defense, December 10, 2015. As of September 14, 2016, <http://www.defense.gov/News/News-Releases/News-Release-View/Article/633748/us-india-joint-statement-on-the-visit-of-minister-of-defence-manohar-parrikar-t>.

Concerns Expressed by Indian Policymakers, Military Officers, and Analysts Regarding the LEMOA, COMCASA, and BECA

*Strategic Concerns*

- These agreements pave the way for a military alliance and force India to compromise its strategic autonomy.
- The agreements, particularly the LEMOA, primarily benefit the United States since Indian ships are less likely to refuel and resupply at U.S. ports.
- The agreements are intended to boost U.S. arms sales to India to the benefit of the U.S. economy and American workers.

*Operational Concerns*

- Implementation of the COMCASA could reveal locations of Indian military assets to Pakistan or other countries.
- Implementation of the COMCASA would be too burdensome for the Indian military, given U.S. procedures.
- There is no clear need for these agreements, given the recent ascendancy of bilateral defense cooperation and the use of workaround agreements, such as the recently renewed Fuel Exchange Agreement.

Source: CNA.

It is unfortunate that these agreements are being discussed at a head of state level and negotiated at the secretarial and ministerial level since most of these types of agreements are negotiated at a lower level and concluded by DOD and its foreign counterpart. CISMOA and BECA agreements, for example, are normally negotiated and completed in the United States at the one-star level and three-star level, respectively. In any event, the intent (from the U.S. perspective, at least) is for most of these transactions to occur in strictly military-to-military channels to avoid attracting disproportionate attention and to limit politicization. Media attention to these relatively high level negotiations has put a public spotlight on the deals, reinforcing the inaccurate view of some observers that these agreements are not routine.

Concerns expressed by Indian policymakers, military officers, and analysts have delayed the completion of the facilitating agreements for many years. This section will elaborate on the main concerns that have been identified by Indian officials and analysts and assess them within legal, historical, or strategic contexts.

## Strategic concerns in perspective

### Do the agreements compromise India's strategic autonomy?

A number of Indian policymakers, defense officials, and analysts have argued that the facilitating agreements raise strategic issues for India. Chief among these is a concern that the agreements will lead to an alliance with the United States or will otherwise compromise India's long-held foreign policy of strategic autonomy. The concept of strategic autonomy—which has been the guiding principle of Indian foreign policy under the governments of both major parties—has its historical roots in India's membership in the NAM, itself partly an outgrowth of the foreign policy of Jawaharlal Nehru, India's first prime minister. In the post-war years following Indian independence, Nehru was a proponent of “non-alignment,” leading India not to formally align with either the United States or the Soviet Union during the Cold War.<sup>49</sup>

Other countries have expressed similar concern that a close defense relationship with the United States more generally would result in their loss of sovereignty or loss of freedom of action. However, close examination of the facts behind some past incidents in which sovereignty concerns were voiced, even by allies, demonstrates that the situation involving India is decidedly different. A review of the countries with which the United States has signed foundational agreements also demonstrates that other members of the NAM have completed foundational agreements without sacrificing sovereignty or damaging relations with the United States.

#### *Sovereignty concerns by allies*

In 2014, the United States negotiated a streamlined defense cooperation agreement with the Philippines<sup>50</sup> to deal with a variety of operational issues when U.S. forces (and contractors) are operating on Philippine soil pursuant to the longstanding

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<sup>49</sup> For more on Nehru and the concept of non-alignment, see: “‘Non-alignment’ was coined by Nehru in 1954,” *Times of India*, September 18, 2006, <http://timesofindia.indiatimes.com/india/Non-alignment-was-coined-by-Nehru-in-1954/articleshow/2000656.cms?>. For more on India's role in the formation of the NAM, see: “History and Evolution of the NAM,” Ministry of External Affairs, Government of India, August 22, 2012. As of September 14, 2016, <http://mea.gov.in/in-focus-article.htm?20349/>.

<sup>50</sup> Joel Guinto, Margaret Talev, and Phil Mattingly, “U.S., Philippines Sign Defense Pact Amid China Tensions,” *Bloomberg*, April 28, 2014. As of September 14, 2016, <http://www.bloomberg.com/news/articles/2014-04-27/philippines-to-sign-defense-deal-with-u-s-amid-china-tensions>.

Mutual Defense Treaty of 1951. This agreement came not long after the Philippines and China sparred over access to the rich fishing grounds in Scarborough Shoal and China blocked the Philippines from developing its offshore hydrocarbon resources in the vicinity of Reed Bank. The Philippines invited a greater U.S. presence because it, among other things, felt threatened by China. The scope of the 2014 agreement includes rotational access to numerous bases in Luzon, Cebu, Mindanao, and Palawan,<sup>51</sup> and takes things a step beyond the 1998 Visiting Forces Agreement, which provided the United States with limited status of forces protections for its personnel and contractors when present in the Philippines on official business. This semi-permanent access was a significant reversal of the painful closure in 1992 of two major U.S. bases in the Philippines, Subic Bay Naval Station and Clark Air Force Base.

Recalling the history of Clark and Subic Bay, two former Philippine senators petitioned the Philippine Supreme Court to invalidate the 2014 Enhanced Defense Cooperation Agreement because it allegedly was concluded in violation of the Philippine Constitution (because the Philippine president did not consult with the Senate) and “offers no security benefits to the Philippines.”<sup>52</sup> It is telling that these senators do not represent a majority within the Philippines, and likewise telling that the Philippine Supreme Court, in a 10-to-4 decision, reaffirmed the constitutionality of the 2014 Agreement. Also, even though there are recurrent criticisms over a greater U.S. footprint in the Philippines, there are virtually no calls in the Philippine press and legislature to cancel the U.S.-Philippines Mutual Defense Treaty of 1951.<sup>53</sup>

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<sup>51</sup> Andrew Tilghman, “The U.S. military is moving into these 5 bases in the Philippines,” *Military Times*, April 1, 2016, <http://www.militarytimes.com/story/military/2016/03/21/us-plans-use-five-new-bases-philippines/82072138/>. Access to these facilities is for agreed-upon activities, including security cooperation exercises, joint and combined training, and humanitarian aid and disaster relief. The United States is allowed to make physical improvements to the facilities and has “unimpeded access” to the sites to preposition supplies, vehicles, aircraft, fuel, etc. “Agreement between the Government of the Republic of the Philippines and The Government of the United States of America on Enhanced Defense Cooperation,” April 28, 2014, <http://www.gov.ph/2014/04/29/document-enhanced-defense-cooperation-agreement/>.

<sup>52</sup> Trefor Moss, “Critics Ask Philippine Court to Declare U.S. Troop Deal Unconstitutional,” *Wall Street Journal*, May 26, 2014. As of September 15, 2016, <http://www.wsj.com/articles/SB10001424052702304811904579585730195376894>.

<sup>53</sup> Despite President Rodrigo Duterte’s rhetoric during a visit to China in October 2016, the alliance has so far endured. “President Rodrigo Duterte of the Philippines traveled to Beijing recently, promising to announce his country’s ‘separation’ from the United States and alarming the White House and his own defense secretary. But something different happened. Instead, Mr. Duterte kept the alliance with the United States intact, appeared to reach an understanding with China to allow Filipino fishermen to return to disputed waters, and, by threatening a geopolitical realignment, distracted from American objections to his country’s growing human rights abuses. Rather than switch allegiances between the two nations, Mr. Duterte managed to play them off each other, in that way improving his position with both and cementing his

The bottom line in the Philippines and other countries that host U.S. forces (such as Germany, Italy, Japan, Korea, Spain, and Turkey) is that while the overarching mutual defense commitments are valued and important, the subsidiary agreements associated with the basing of U.S. forces on their foreign soil have been problematic at times for most countries. The problems stem from perceptions by the host governments that they are ceding sovereignty (Italy, Korea, and the Philippines); are monopolizing important territories needed by local populations (Japan and Germany); or are predisposing the host government to support extra-regional military activities by the United States, to include support for U.S. operations in connection with the global war on terrorism (Italy and Turkey). The disposition of offenses by U.S. service personnel while present in these host countries has been especially problematic from a sovereignty perspective (i.e., U.S. personnel cannot be publicly perceived as being above local law).<sup>54</sup> Some of these concerns certainly have merit. A large U.S. military footprint on foreign territory will inevitably evoke local suspicions and concerns about loss of control, and it is undeniable that there can be negative consequences to having large numbers of U.S. forces stationed on foreign territory. Local opposition to U.S. bases in Okinawa, for example, has stemmed from a variety of grievances, from air traffic noise and the perception of the bases as a drag on economic development prospects, to sexual assaults committed by servicemen, as well as a recent murder linked to a U.S. contractor.<sup>55</sup>

In the end, it is important to recall that countries such as Japan, Korea, Turkey, Italy, and the Philippines are the recipients of legally binding security commitments of the United States to their protection of their territory against attack or invasion. That commitment is not cheap: in the case of Korea,<sup>56</sup> for example, the United States funds roughly 60 percent of the direct costs of stationing roughly 28,500 personnel in that country, even though South Korea's defense spending (as a percentage of GDP) is well

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image at home as a strong nationalist beholden to foreign powers. And he did it while keeping his nation's security guaranteed by a 65-year-old treaty with the United States." Max Fisher, "Rodrigo Duterte Plays U.S. and China Off Each Other, in Echo of Cold War," *New York Times*, November 3, 2016. As of December 20, 2016, <http://www.nytimes.com/2016/11/04/world/asia/philippines-duterte-us-china-cold-war.html>.

<sup>54</sup> Of course, the issue is often intractable because DOD must also safeguard the constitutional law rights of U.S. personnel to basic legal protections, including the rights to counsel, procedural due process, and prohibition(s) against cruel or unusual offenses that are not recognized in U.S. law.

<sup>55</sup> Jonathan Soble, "Okinawa Murder Case Heightens Outcry Over U.S. Military's Presence," *New York Times*, June 4, 2016. As of September 15, 2016, <http://www.nytimes.com/2016/06/05/world/asia/okinawa-murder-case-heightens-outcry-over-us-militarys-presence.html>.

<sup>56</sup> Mark E. Manyin et al., *U.S.-South Korea Relations*, Congressional Research Service, April 26, 2016. As of September 15, 2016, <https://www.fas.org/srg/crs/row/R41481.pdf>.

below that of the United States.<sup>57</sup> Given that, it is only reasonable for Washington to want to secure legally binding commitments from host governments to ensure the protection of U.S. personnel, U.S. property and supplies, and the operations that are conducted from U.S. bases on foreign territory.

None of these considerations apply in the case of India. There is no mutual bilateral defense treaty or basing agreement in the cards for the foreseeable future. There are no multilateral treaty obligations, such as NATO or the Organization of American States (OAS) Charter,<sup>58</sup> which would create a situation in which India would come to the aid of the United States, or vice versa. From an international law perspective, India remains a free agent despite an increasing amount of bilateral activity with the United States. There is no parallel between India's situation and those of allies such as the Philippines, Japan, or Korea that have had disagreements with the United States over basing, foreign criminal jurisdiction, or ongoing operational issues.

### *Foundational agreements signed with non-aligned partners*

Neither does India's non-aligned disposition preclude it from signing these agreements. In fact, a number of U.S. partners that are members of the NAM have signed similar agreements. Since joining the NAM in 1994 following the end of apartheid, South Africa has signed 26 agreements with the United States, of which seven related to defense. These included a GSOMIA in 1998, followed by an ACSA in 2001 and a BECA in 2013. The United States has signed 72 agreements with Indonesia since it joined the NAM in 1961, including seven defense agreements. Among these were a "Memorandum of understanding concerning mapping, charting, and geodesy cooperation" in 1977 and an ACSA in 2010. Among the 16 defense agreements Singapore has signed with the United States since joining the NAM in 1970 are a GSOMIA in 1983, a "Memorandum of understanding concerning configuration management of tactical command, control and communications standards, with annexes" in 1991, and an ACSA in 2011. Since joining the NAM in 1970, Malaysia has signed five defense agreements with the United States, including an ACSA in 2005.<sup>59</sup> The United States has maintained positive relations with all of these countries, and concerns regarding sovereignty have generally not been raised.

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<sup>57</sup> Manyin, 2016, pp. 20-21. In 2012, for example, South Korea contributed roughly \$765 million, and the United States \$1.1 billion, to the non-personnel costs of maintaining the U.S. military garrison.

<sup>58</sup> See, Article 28-29. The obligations in the OAS Charter are less prescriptive than those in the 1949 NATO Mutual Defense Agreement but still contain general mutual defense norms.

<sup>59</sup> "Treaties in Force," U.S. Department of State, January 1, 2013, and supplement dated January 1, 2015. As of September 15, 2016, <http://www.state.gov/s/l/treaty/tif/index.htm>.



This suggests that India's desire to maintain its foreign policy of strategic autonomy is not imperiled by or at odds with these foundational defense agreements.

## Do the agreements primarily benefit the United States?

A key concern of some Indian experts is that the agreements primarily benefit the United States. One such argument is that India has less to gain from the LEMOA, since Indian Navy ships are less likely to refuel and resupply at U.S. ports than U.S. Navy ships are at Indian ports. However, this view overlooks several advantages that India would realize. The LEMOA does not require that India avail itself of U.S. fuel and supplies, but it does create a legal framework that simplifies the exchange of goods when necessary. As India increasingly realizes its blue-water naval ambitions—including the planned commissioning of its first indigenously built aircraft carrier in 2018—one can easily envision scenarios in which opportunities for replenishment by U.S. vessels at sea might be useful to Indian commanders from an operational standpoint, particularly as bilateral exercises continue to focus on interoperability. Indeed, at least one Indian analyst, a former navy officer, has argued that the LEMOA could create operational opportunities for the Indian Navy by facilitating U.S.-India naval cooperation outside the PACOM area of responsibility.<sup>60</sup>

The LEMOA also lowers the operational costs of India's military—in particular, the cost of its participation in multilateral exercises, when logistical exchanges are most likely to take place.<sup>61</sup> As mentioned earlier, the exchange of logistical supplies on a quid pro quo basis avoids surcharges and markups on these goods and services. While every effort is made to balance the accounts with an exchange of goods of equal value over the course of the year, a balance may need to be paid at the end. If this is the case, India would pay the price that the U.S. military itself pays for the items exchanged.

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<sup>60</sup> Vijay Sakhuja, "India-U.S. Naval Cooperation Gathers Momentum Despite Doubts," Sigur Center for Asian Studies, George Washington University, September 2016. As of September 29, 2016, [http://www.risingpowersinitiative.org/wp-content/uploads/PolicyBrief\\_September2016\\_US-IndiaNavy-1.pdf](http://www.risingpowersinitiative.org/wp-content/uploads/PolicyBrief_September2016_US-IndiaNavy-1.pdf).

<sup>61</sup> Dr. P.K. Ghosh, a retired Indian Navy officer who opposes the BECA and COMCASA, makes this argument in support of the LSA (LEMOA): "The LSA would have lowered the operational costs of Indian defence forces. India participates in various multilateral exercises internationally and has to pay for its logistical requirement upfront in scarce foreign exchange. With LSA in place, the issue of physically paying the money could have been avoided. India, instead, would have to provide reciprocal facilities for the U.S. defence forces when requested." Ghosh, 2016.

Some Indian analysts also suggest that following the conclusion of the facilitating agreements, the United States will make demands upon India for contributions of personnel, ports, airways, and political support in exchange for U.S. military assistance. It is possible that the United States may later seek India's support in some matter that includes use of one of its ports or airfields.<sup>62</sup> However, the LEMOA agreement, for example, facilitates U.S. access to Indian logistics infrastructure; it does not require India to provide such access. In this sense, as framework agreements, the facilitating agreements are modest contributions to a growing defense relationship and will not affect India's sovereignty or autonomy.<sup>63</sup>

The lack of agreements will continue to impact India's ability to procure high-technology military equipment from the United States and hamper interoperability of U.S. and Indian forces, which may, in turn, affect India's ability to participate in multilateral or increasingly complex bilateral exercises or operations with the United

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<sup>62</sup> The provision of bases, ports, or airfields in support of U.S. military operations against third parties has been a matter of controversy in the past. During the Gulf War, political pressure forced Prime Minister Chandra Shekhar to halt the refueling of U.S. transport aircraft at Santa Cruz airport in Mumbai. However, the episode has also been cited as an example of U.S.-India cooperation. "India Says It Will Withdraw U.S. Planes' Refueling Right," *New York Times*, February 18, 1991. As of September 15, 2016, <http://www.nytimes.com/1991/02/18/world/war-in-the-gulf-india-says-it-will-withdraw-us-planes-refueling-right.html>.

<sup>63</sup> Indeed, Lt. Gen. Philip Campose (Ret.), former vice chief of staff of the Indian Army, states that the LEMOA will not require India to provide logistical support for U.S. military operations against third parties: "The LEMOA would provide the US forces regular access to Indian military bases like Mumbai, Vizag, Kochi, and Port Blair while granting Indian ships access to US bases in Djibouti, Diego Garcia, Guam and Subic Bay as well as Hawaii and the US mainland. However, there is a caveat with regard to logistics support for military operations undertaken against third countries, where both the US and India reserve the right to review the permission accorded by the agreement." Philip Campose, *Has the Dragon pushed the Elephant into the Eagle's Embrace?* Centre for Land Warfare Studies, June 13, 2016, <http://www.claws.in/1586/has-the-dragon-pushed-the-elephant-into-the-eagles-embrace-It-gen-philip-campose.html>. In his trenchant analysis of the LEMOA, Captain Gurpreet S. Khurana, Ph.D. (Indian Navy, Ret.), executive director of India's National Maritime Foundation, also finds that the LEMOA only comes into play for standing arrangements such as the MALABAR naval exercise: "If hypothetically, the US seeks to undertake a coordinated military operation with India to flush out a terrorist group in a neighbouring country, based on many factors, India may decide [to] turn down the US proposal, with no obligation to offer the US forces access to Indian logistic facilities." Gurpreet S. Khurana, *Indo-US Logistics Agreement LEMOA: An Assessment*, National Maritime Foundation, September 8, 2016, <http://www.maritimeindia.org/View%20Profile/636089093519640938.pdf>. The *Indian Express* has also reported that such a provision exists: "India can deny the U.S. the use of its facilities for an operational mission Delhi is not comfortable with, sources said." Sushant Singh, "Manohar Parrikar to visit U.S. next week, may sign deal on logistics exchange," *Indian Express*, August 24, 2016, <http://indianexpress.com/article/india/india-news-india/manohar-parrikar-to-visit-us-next-week-may-sign-deal-on-logistics-exchange-2992986/>.

States. These exercises benefit the Indian armed forces at least as much as the U.S. armed forces. Exercises on their own do not lead to alliances, and, because countries must opt to participate, they do not constrain sovereignty or autonomy. Exercises do, however, provide mutual benefits to participating countries by developing relationships between militaries, practicing combined operations, and enhancing operational effectiveness and readiness for all participants. These benefits take on added importance as countries increasingly seek to conduct operations in bilateral and multilateral coalitions. For this reason, and in the belief that all armed forces learn and improve from combined operations, the United States has engaged in bilateral and multilateral exercises for decades with as many of the countries as it can in the theaters in which it operates.

In other respects, the agreements actually come at a cost to the United States. The data that would be shared under the BECA and COMCASA would be provided at little or no direct costs to India, even though the United States has expended significant resources in building and maintaining these databases. And, even though BECA and CISMOA agreements, like the COMCASA (and their underlying statutes), are premised on equitable sharing of data, the reality is that most countries that gain access to those data feeds contribute much less information than that which is supplied by the United States.<sup>64</sup>

## Are the agreements intended to boost U.S. arms sales?

Some Indian experts question the motives of the United States in pursuing these facilitating agreements, arguing that the agreements are intended to benefit the U.S. economy and American workers by boosting U.S. arms sales to India.<sup>65</sup> U.S. defense trade with India has certainly increased significantly in recent years, and it is clear that the U.S. government and private sector would like to see bilateral trade continue

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<sup>64</sup> This is not to imply that these agreements are a “giveaway” by Washington. Rather, DOD reasons that, in the end, it is far more cost-effective and safe to be able to provide these data feeds to other militaries to be interoperable with U.S. forces, and the benefits outweigh any incremental costs in providing the data feed.

<sup>65</sup> For example, Siddharth Varadarajan argued in *The Hindu* that the LSA and CISMOA aim to increase interoperability to boost U.S. arms sales to India and support “billions of dollars of business and thousands of American jobs; and enable the U.S. to use its intimacy with the Indian armed forces to outsource low-end operations in the region, particularly in disaster management and counter-piracy.” Siddharth Varadarajan, “A Partnership Built on Flawed Assumptions,” *The Hindu*, November 5, 2010. As of September 15, 2016, <http://www.thehindu.com/opinion/lead/a-partnership-built-on-flawed-assumptions/article868913.ece>.

to grow, including in the area of defense. It is also possible that the completion of the agreements could indirectly lead to more defense trade between the countries inasmuch as the agreements are intended to advance the growing defense relationship between the countries by facilitating military exercises and greater interoperability, which could lead to further Indian procurement of American defense articles. However, the claim that the agreements are intended to boost defense trade, or would directly lead to additional arms sales by the United States, is less credible.

The agreements do not require India to purchase U.S. systems; rather, these are all framework agreements that facilitate the basic exchanges of data—at virtually no cost—and are not exclusively linked to the procurement of U.S. systems. Even if it signed the agreements, India would maintain its freedom of action and it has the industrial and technical base to advise its policymakers in making sovereign decisions about whether to purchase U.S. systems that might trigger end-use monitoring or other requirements.

## Operational concerns in perspective

Could implementation of the COMCASA reveal locations of Indian military assets to Pakistan or other countries?

A key operational concern of India is that the implementation of the COMCASA—a modified version of a CISMOA agreement—would “enable Washington to monitor Indian communications in operations where the United States may be neutral or even adversarial, such as contingencies relating to Pakistan” or that sensitive communications and information could be shared with third parties, including Pakistan.<sup>66</sup>

CISMOA agreements, such as the COMCASA, function as a framework for a wide range of interoperability activities, including joint communications, bilateral secure communications, formats for messages, and data exchange standards. While it is true that the CISMOA forms the legal platform for sharing tactical data links, the data feeds to foreign governments can be modified to address the very concerns that

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<sup>66</sup> Baruah, 2016, p. 54. See also: Manoj Joshi, “India is Making Up for the Lack of Vision by Bandwagoning with the U.S.,” *The Wire*, April 4, 2016. As of September 15, 2016, <http://thewire.in/27400/india-is-making-up-for-lack-of-vision-by-bandwagoning-with-the-us/>.

India expresses. Essentially, there is no automatic sharing between countries on the platforms unless desired and approved; the communications exchanges and data feeds can be separated to prevent access by third parties on the platform. In other words, India and Pakistan would not have access to each other's communications and information, despite using a common platform for classified communications with the United States.<sup>67</sup> Similarly, if India wished not to share its movements with the United States, it could simply suspend its transmission and receipt of the affected tactical data links. Although CISMOA can be used as a legal platform for providing such links, the exchange of those data is not required under the CISMOA. The CISMOA enables such exchanges; it does not mandate them.

## Would the COMCASA and BECA subject India to burdensome U.S. procedures?

Another argument against the COMCASA and BECA agreements is that it makes no sense for India to bind itself to U.S. procedures in the absence of regular joint operations,<sup>68</sup> particularly restrictions that might make India too reliant on the United States for major systems, supplies, and upgrades.<sup>69</sup> Even a proponent of the agreements has noted that data feeds that are enabled by the COMCASA and BECA

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<sup>67</sup> CNA discussion with former U.S. defense official, 2016.

<sup>68</sup> Even though Dr. P.K. Ghosh supports the LSA (LEMOA) because it favors the interests of the Indian Navy, he is dismissive of U.S. claims that the LSA, CISMOA, and BECA agreements are common for all countries that receive U.S. high technology and are not unique to India. He concludes that it is not in India's interest to sign the COMCASA (also known generically as a CISMOA) and BECA: "Since the Indian forces are unlikely to operate with the U.S. forces in a conflict situation, it is unnecessary to bind Indian forces down to U.S. codes and operating procedures as it is much better to have our own speech secrecy and communication/data transfer equipment than the U.S. ones. Hence, the Indian position on [not] signing the CISMOA and BECA to date has been proved correct notwithstanding the U.S. pressure to bend on this account... Such clarity of thought by the Indian Defence Ministry has definitely placed India in a strategically advantageous position." Ghosh, 2016.

<sup>69</sup> After India agreed to end-use monitoring in 2009, Siddharth Varadarajan argued that India should be wary of signing the defense foundational agreements—lest it be drawn into the embrace of Washington, "an expeditionary and belligerent power in Asia"—and should subordinate its temptation to acquire U.S. technology. He recommended that India proceed with caution because end-use restrictions and bans on modifications would, in his view, make New Delhi too dependent upon Washington for major system, supplies, and upgrades over the long term. Varadarajan, 2010.

agreements could invite end-use monitoring,<sup>70</sup> which India “reluctantly” agreed to in 2009.<sup>71</sup> This concern is a bit of an overgeneralization, because only when exchanged data find their way into a U.S.-supplied system—that is, ITAR-controlled and provided to India via an FMS case or ITAR export license—would the end-use monitoring restrictions apply. Although some Indian analysts have urged Indian policymakers to be cautious with regard to U.S. end-use monitoring and reconfiguration restrictions,<sup>72</sup> these are direct requirements under U.S. law (AECA) and satisfy U.S. international non-proliferation commitments. So, a U.S. waiver of those end-use restrictions is neither appropriate nor possible from the U.S. legal perspective.

## Is there an operational need for these agreements?

Some Indian experts argue that there have been few missed opportunities resulting from the lack of facilitating agreements. They see no clear need for these agreements, given the recent ascendancy of bilateral defense cooperation and the use of workaround agreements—such as the renewed 2015 Fuel Exchange Agreement<sup>73</sup>—in lieu of facilitating agreements. Some believe that the COMCASA and BECA do little to promote Maritime Domain Awareness (MDA), for example, and that there are other means of sharing information to achieve MDA on a case-by-case basis, such as a recently concluded technical arrangement to share white-hull shipping data.<sup>74</sup>

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<sup>70</sup> A proponent of the agreements, retired air marshal R.K. Sharma of the Centre for Air Power Studies, notes that data feeds (enabled by the COMCASA and the BECA agreement) could invite end-use monitoring. Sharma, 2016, p. 3.

<sup>71</sup> “It must be remembered that in July 2009, India had reluctantly signed the End-User Monitoring Agreement, under U.S. pressure, to allay their apprehensions about the usage of the U.S. defense equipment being procured by India. But, this agreement was signed after extended negotiations that eventually ensured that it kept intrusive, “monitoring” American inspectors away from Indian military bases.” Ghosh, 2016.

<sup>72</sup> Varadarajan, 2010. See also: Sharma, 2016.

<sup>73</sup> The Fuel Exchange Agreement was renewed in late 2015. See: “US-India Joint Statement on the visit of Minister of Defence Manohar Parrikar to the United States,” 2015. See also: Goulait, 2016.

<sup>74</sup> From the joint statement released by India and the United States on the occasion of Prime Minister Modi’s June 2016 visit to Washington: “Owing to mutual interest in maritime security and maritime domain awareness, the leaders welcomed the conclusion of a technical arrangement for sharing of maritime ‘White Shipping’ information.” “Joint Statement: The United States and India: Enduring Global Partners in the 21st Century,” Office of the Press Secretary, The White House, June 7, 2016. September 15, 2016, <https://www.whitehouse.gov/the-press-office/2016/06/07/joint-statement-united-states-and-india-enduring-global-partners-21st>.

While workarounds have been developed in certain limited cases, the absence of an overarching agreement can be problematic for U.S. commanders from a legal perspective. As noted earlier, a U.S. military commander could run afoul of the AECA, the Purpose Rule, and the ADA—and perhaps even risk criminal liability—by transferring telecommunications, logistics support, or geospatial information absent a legal authority and bilateral commitment to do so, except in an emergency.<sup>75</sup> Neither does a U.S. commander have the authority to receive funds or other things of value unless there is a statutory authority.<sup>76</sup>

The lack of facilitating agreements could also be problematic for Indian commanders from an operational standpoint. The legal restrictions identified above, and the consequences to U.S. commanders for violating them, limit the ability of the United States to cooperate with India in operations at a time when the overall defense relationship is growing, the United States is rebalancing toward Asia, and the Indian Navy is maturing as a blue-water maritime force. Furthermore, it is likely that India would benefit in many operational ways by signing the agreements. For example, in the recent case in which India asked for U.S. assistance in locating a missing aircraft, the direct interoperability that would have been afforded by an agreement could have facilitated a much more efficient and effective search and rescue effort. The conclusion of the COMCASA and BECA agreements could also allow for greater cooperation in antisubmarine warfare. This capability is of great interest to India given the continuing presence of Chinese submarines in the Indian Ocean, but since so much of antisubmarine warfare tactics and operations involve classified information, cooperation will be limited without agreements on communications security and data sharing.

The facilitating agreements also provide opportunities for more complex bilateral exercises and promote interoperability between the U.S. and Indian militaries in a way that workaround agreements and case-by-case solutions cannot. Although limited workarounds have been developed to facilitate interoperability in individual exercises, one-off agreements and workarounds are unlikely to stand the test of time and can impede India's interoperability with the U.S. military and with other countries that have developed interoperability with the United States, especially with

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<sup>75</sup> There is a small emergency exception to the rule prohibiting U.S. military commanders from providing U.S. defense articles and services. This extends to the provision of non-lethal assistance in the humanitarian field to foreign recipients. DOD has a few standing programs and authorities to provide limited types of humanitarian assistance.

<sup>76</sup> See earlier discussion of the prohibition of augmentation of appropriations. As noted in that discussion, this would legally prevent a U.S. military commander from exchanging one type of logistics support for another outside of the context of an ACSA arrangement. GAO, The Honorable Bill Alexander, B-213137, Jan 30, 1986 (unpublished) (popularly known as "Honduras II").

regard to communications standards. This can lead to lost time and opportunities in responding quickly to urgent, unforeseen circumstances. It also limits the ability of both countries to coordinate and cooperate in even non-controversial operations, such as the provision of humanitarian assistance and disaster relief. Although the United States and India cooperated in such operations to an extent after the 2004 tsunami, for example, limited interoperability between their navies reduced the scope, which consisted mainly of close communication and de-confliction rather than integrated operations.<sup>77</sup>

Rather than restrict its options, these agreements provide India with considerable flexibility in how it approaches its operational engagements with the United States and in the systems it purchases. With this increased access to U.S. technology comes the “cost” of being exposed to the U.S. legal system and the need to sign agreements such as the BECA and the COMCASA. This is an unavoidable cost that all countries—both U.S. allies and partners—face when doing business with the United States.

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<sup>77</sup> Nilanthi Samaranayake, Catherine Lea, and Dmitry Gorenburg, *Improving U.S.-India HA/DR Coordination in the Indian Ocean* (Arlington, VA: CNA, July 2014). As of September 15, 2016, [https://www.cna.org/CNA\\_files/PDF/DRM-2013-U-004941-Final2.pdf](https://www.cna.org/CNA_files/PDF/DRM-2013-U-004941-Final2.pdf).



## Recommendations

This study is primarily a legal analysis of the categories of foundational agreements that comprise the “facilitating” agreements that the United States has sought to negotiate with India. It explains the legal requirement for the agreements and examines Indian concerns from a U.S. legal perspective. As a result of its findings, the study presents U.S. officials with recommendations for the negotiation of the COMCASA, BECA, and future agreements to further bilateral defense relations.

- Future negotiations should be conducted at an appropriate level that reflects the routine nature of the agreements. The fact that the agreements are being negotiated at the secretarial and ministerial level does not mean that the agreements themselves are especially sensitive or controversial. These types of agreements—particularly ACSA and BECA—have previously been concluded between the United States and non-aligned partners without concerns over loss of sovereignty. The fact that dozens of countries have concluded these types of agreements with the United States can be taken as a demonstration of the international law principle of equality among states when it comes to the status of both parties in these international transactions. In that sense, signing these agreements is a demonstration of sovereignty by the other party to the agreement.
- U.S. defense officials should continue to be patient with India's reluctance to enter into these agreements, given that the defense relationship has developed at a rapid pace from the Indian perspective, and given India's desire to maintain its strategic autonomy, even as the United States rebalances to Asia.
- Indian policymakers and military officers should consider that U.S. officials have almost no flexibility with respect to the transfers of defense articles and services (to include valuable information) absent a formal agreement. The fact that a four-star U.S. officer might be involved in bilateral discussions does not mean that this senior official can deviate from legal and documentary standards.
- U.S. negotiators should emphasize that all three of these agreements mostly create a *framework* for cooperation in the fields of communications, logistics, and geospatial-intelligence information. The facilitating agreements do not lock either side into a requirement to exchange specific information or support, or to buy specified systems. If one of these agreements supports a

particular platform that India is considering buying from the United States, Indian defense planners should decide whether to purchase the system(s) rather than expect U.S. flexibility on the terms.

- Given that these agreements take considerable time to negotiate and conclude, U.S. defense officials should make the case that having this agreement “on the shelf” would seem to be much more in India’s interest and preserves its greatest flexibility. Now that the LEMOA has been signed, most Indian concerns (in terms of end-use monitoring and retransfer limitations) seem to focus on the COMCASA agreement. However, a good portion of these agreements deal with legal framework issues that are unrelated to the sales of particular systems, including configuration management, common standards, and the framework for exchanging telecommunications support. Capturing these general matters in an agreement does not affect India’s concerns with perceived loss of sovereignty or put India on a path to be beholden to U.S. systems and technology.
- Indian critics of end-use monitoring should understand that it is firmly part of U.S. law and also reflective of international nonproliferation and export norms (including the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group, the Wassenaar Arrangement, and the Zangger Committee), as well as norms against the proliferation of conventional weapons.<sup>78</sup> Aversion by Indian policymakers and analysts toward end-use monitoring and retransfer restrictions is not based on a full appreciation of U.S. law and policy that applies to Washington’s dealings with all foreign countries.

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<sup>78</sup> See, generally, United Nations Office for Disarmament, <https://www.un.org/disarmament/wmd/counter-terrorism/>.



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